

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
PETERSON PETROLEUM OF NEW HAMPSHIRE, INC.:	:	DETERMINATION
	:	DTA NO. 813045
for Review of a Denial, Suspension, Cancel-	:	
lation or Revocation of a License, Permit or	:	
Registration under Article 12-A of the Tax Law.	:	

Petitioner, Peterson Petroleum of New Hampshire, Inc., P.O. Box 900, Millerton, New York 12546, filed a petition on August 16, 1994 for review of a denial, suspension, cancellation or revocation of a license, permit or registration under Article 12-A of the Tax Law.

A hearing was held before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on September 16, 1994 at 9:15 A.M., with briefs to be submitted by October 17, 1994. At petitioner's request, the record was held open after the hearing until September 26, 1994 for the introduction of additional evidence. Petitioner appeared by DeGraff, Foy, Holt-Harris & Mealey, Esqs. (James H. Tully, Jr., Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Donald C. DeWitt and John E. Matthews, Esqs., of counsel).

ISSUE

Whether sufficient grounds exist to support the proposed refusal to register petitioner as a distributor of diesel motor fuel under Article 12-A of the Tax Law.

FINDINGS OF FACT

On October 19, 1992, the Division of Taxation ("Division") received from Peterson Petroleum of New Hampshire, Inc. ("PPNH") an application for registration as a distributor of diesel motor fuel. The application indicated that PPNH's president was James T. Metz, its vice-

president was John Farr Simons III and its secretary was Lauren H. Simons.¹

On April 7, 1993, the Division issued a Notice of Proposed Refusal to Register as a Motor Fuel Distributor under Article 12-A of the Tax Law. The notice indicated that the basis for the refusal was that a responsible person listed on the application had unpaid liabilities finally determined to be due.²

PPNH initially protested the refusal to register, but withdrew its protest after a Bureau of Conciliation and Mediation Services ("BCMS") conferee upheld the refusal.

On July 30, 1993, the Division received another Application for Registration as a Distributor of Diesel Motor Fuel. This application differed from the initial one in that Alicia Metz (daughter of James T. Metz and sister of Lauren H. Simons) was listed as the president of PPNH.

The application further indicated that PPNH was a wholly-owned subsidiary of Huntington & Kildare, Inc. ("H & K"), a New York corporation

with its principal place of business in Millerton, New York. The application stated that H & K's other officers were: Lauren H. Simons - vice-president; and Kathryn T. Metz - secretary/treasurer. The application also indicated that, in addition to PPNH, Peterson Petroleum, Inc. ("PP, Inc.") and Two Lincoln Advisory Corp. were other corporations wholly-owned by H & K.

In August 1993, correspondence was exchanged between PPNH's then-representative (Richard M. Kowee, Esq.) and personnel of the Division's Transaction and Transfer Tax

¹An Application for Registration as a Sales Tax Vendor (see, Exhibit "L") received from PPNH in September 1992 listed the same officers and also indicated that Lloyd Helm was a vice-president.

²A memorandum from Al Ruth of the Division's Tax Enforcement Bureau stated that James T. Metz had an outstanding assessment for income tax, that the assessment had been referred to collection and that a warrant had been issued on April 24, 1991 (see, Exhibit "K").

Bureau ("TTTB") -- Fuel, Alcohol, Cigarette and Carrier Tax Section ("FACCTS") regarding PPNH's application. A letter to Mr. Koweeck from Bonnim Tanzman of TTTB-FACCTS stated, in part, as follows:

"Finally, please be advised that Peterson Petroleum of New Hampshire is not registered as a Diesel Distributor in the State of New York and therefore may not sell diesel product, including heating oil, in New York State. If Peterson Petroleum of New Hampshire is currently selling diesel product, including #2 heating oil, for any purpose in New York State, it must immediately cease doing so. Conducting an unregistered diesel business in New York State is illegal and may constitute a felony."

A subsequent letter from Mr. Tanzman to Mr. Koweeck, dated September 15, 1993, stated, in part, as follows:

"On another subject, it has come to my attention that Peterson Petroleum of New Hampshire has been purchasing diesel fuel and filing returns using Peterson Petroleum's registration number. I must again advise you that Peterson Petroleum of New Hampshire is not a registered Diesel Distributor in New York State and therefore may not, among other things, sell diesel product (including #2 heating oil) to any person for any purpose, other than a retail sale of previously tax-paid product at a gas station. The importation or distribution of diesel product while not properly registered is grounds for refusal to register and subjects the distributor to criminal prosecution under §1812-a of the Tax Law. Impersonating a registered distributor or allowing the use of your registration number by another are each violations of the Tax Law punishable by civil and criminal sanctions."

Both letters from Mr. Tanzman also requested that certain additional information be provided before the application could properly be considered.

On November 26, 1993, the Division issued to PPNH a Notice of Proposed Refusal to Register as a Distributor of Diesel Motor Fuel under Articles 12-A and 13-A of the New York State Tax Law which set forth the basis of the proposed refusal as follows:

- "1. You failed to provide information as requested in our letters dated 8/16/93 and 9/15/93.
- "2. You failed to disclose that James T. Metz, Jr., and Kathleen Metz are each indirect owners of more than 10% of the stock of Peterson Petroleum of New Hampshire, Inc.
- "3. James T. Metz, Jr. and Kathleen Metz, each indirect owners of more than 10% of the stock of Peterson Petroleum of New Hampshire, Inc. are and/or have been shareholders or officers of other corporations have/had [sic] finally determined outstanding liabilities which have not been paid in full.
- "4. James T. Metz, Jr. and Kathleen Metz, each indirect owners of more than 10% of the stock of Peterson Petroleum of New Hampshire, Inc., each have

finally determined outstanding liabilities under New York's Tax Law which have not been paid in full.

- "5. You failed to disclose that Lauren H. Simons, Secretary- Treasurer of Peterson Petroleum of New Hampshire, Inc. is an officer of New England Air Transport, Inc.
- "6. You failed to disclose that New England Air Transport, Inc., a corporation owned or controlled by Lauren H. Simons, Secretary-Treasurer of Peterson Petroleum of New Hampshire, Inc., has finally determined outstanding liabilities which have not been paid in full.
- "7. Lauren H. Simons, Secretary-Treasurer of Peterson Petroleum of New Hampshire, Inc. is an officer of New England Air Transport, Inc., a corporation with finally determined outstanding New York State tax liabilities which have not been paid in full.
- "8. You have operated as a Diesel Distributor in New York without being properly registered to do so, (Tax Law 283.4).
- "9. You have impersonated a registered distributor by using the registration of Peterson Petroleum, Inc. to conduct your diesel business while you were not, in fact, registered. (Tax Law 283.4(IV))."

By letter dated August 29, 1994, the Division amended its notice of proposed refusal to register by asserting the following additional bases:

"10. Huntington and Kildare, Inc., the owner of 100% of the stock of Peterson Petroleum of New Hampshire, Inc., operated as a distributor of diesel motor fuel in New York State without being registered to do so.

"11. Huntington and Kildare, Inc., the owner of 100% of the stock of Peterson Petroleum of New Hampshire, Inc., failed to file returns required of a distributor of diesel motor fuel pursuant to Articles 12-A and 13-A of the Tax Law.

"12. Huntington and Kildare, Inc., the owner of 100% of the stock of Peterson Petroleum of New Hampshire, Inc., was also the owner of 100% of the stock of Peterson Petroleum, Inc. at the time that the registration of Peterson Petroleum, Inc. was cancelled by the Department of Taxation and Finance within the last five years.

"13. Alicia Metz and Lauren H. Simons, President and Secretary-Treasurer of Peterson Petroleum of New Hampshire, Inc. respectively, are each officers of and shareholders of 16 2/3% of the stock of Huntington and Kildare, Inc., a corporation which is the owner of 100% of the stock of Peterson Petroleum of New Hampshire, Inc. which operated as a distributor of diesel motor fuel in New York State without being registered to do so.

"14. Alicia Metz and Lauren H. Simons, President and Secretary-Treasurer of Peterson Petroleum of New Hampshire, Inc. respectively, are each officers of and shareholders of 16 2/3% of the stock of Huntington and Kildare, Inc., a corporation which is the owner of 100% of the stock of Peterson Petroleum of New Hampshire, Inc. which failed to file returns required of a distributor of diesel motor

fuel pursuant to Articles 12-A and 13-A of the Tax Law.

"15. Alicia Metz and Lauren H. Simons, President and Secretary-Treasurer of Peterson Petroleum of New Hampshire, Inc. respectively, are each officers of and shareholders of 16 2/3% of the stock of Huntington and Kildare, Inc., a corporation which is the owner of 100% of the stock of Peterson Petroleum of New Hampshire, Inc. and which was also the owner of 100% of the stock of Peterson Petroleum, Inc. at the time that the registration of Peterson Petroleum, Inc. was cancelled by the Department of Taxation and Finance within the last five years."

At the hearing, Bonnim Tanzman appeared and testified as to the procedures followed by the Division in reviewing petitioner's application and the bases for issuance of the notice of proposed refusal to register (and the additional grounds asserted pursuant to the issuance thereof). For clarity of reference, "Reason No. ____" shall refer to the 9 bases set forth in the notice of proposed refusal to register (see, Finding of Fact "6"; Exhibit "R") and the 6 additional bases contained in the amendment to the notice of proposed refusal to register (see, Finding of Fact "7"; Exhibit "D").

(a) Reason No. 1 - The testimony of Mr. Tanzman was that, at the time of the issuance of the notice of proposed refusal to register, PPNH had failed to provide the information requested in the Division's letters of August 16, 1993 and September 15, 1993 (see, Findings of Fact "4" and "5"; Exhibits "P" and "Q"). The Division concedes that the information was eventually obtained through the efforts of its own personnel and through submission by PPNH's current representative.

(b) Reason No. 2 - Mr. Tanzman stated that the Division had no information concerning the transfer of the stock of PPNH from James T. Metz and Kathleen M. Metz to their children. In addition, the 1990 New York State personal income tax return of James T. and Kathleen M. Metz (see, Exhibit "T") indicated that they owned H & K, which owned PPNH. Also, a letter dated December 13, 1989 from an attorney representing H & K to the Division's Real Property Transfer Gains Tax Unit (see, Exhibit "V") stated that James T. and Kathleen M. Metz each owned 20% of the stock of H & K. As further evidence of the Division's assertion that James T. and Kathleen M. Metz continued to own stock of PPNH was the fact that no change of business information had ever been reported to the Division as

required (see, Exhibit "FF") and the original application for registration as a sales tax vendor filed by PPNH (see, Exhibit "L") listed James T. Metz as the president.

(c) Reason No. 3 - Exhibit "S" is a CARTS (Case and Resource Tracking System) printout of open assessments against PP, Inc., Two Lincoln Advisory Services, Inc., New England Air Transport, Inc., PPNH and H & K, each of which were corporations in which James T. Metz and Kathleen M. Metz had ownership (see, Exhibit "T", 1990 New York State income tax return).

(d) Reason No. 4 - Exhibit "U" is a CARTS printout of certain open sales tax assessments against James Metz and Kathleen Metz.

(e) Reason No. 5 - A Client Account Agreement of New England Air Transport, Inc. and a Notice of Failure to File Returns of New York State, City of New York and City of Yonkers Income Tax Withheld, both of which are contained in Exhibit "W", indicate that Lauren H. Simons, PPNH's secretary-treasurer, was the secretary of New England Air Transport, Inc.

(f) Reasons No. 6 and 7 - Exhibit "S", the CARTS printout relating to assessments against corporations at issue herein, reveals open corporation and sales tax assessments against New England Air Transport, Inc.

(g) Reason No. 8 - Exhibit "X", a sales tax return of PPNH for the quarter ending May 31, 1993, indicates gross sales of \$803,258.00, as a gasoline wholesale distributor. Exhibit "Y", a New York State Petroleum Business Tax Return for the month of April 1993, has a preprinted label containing the name "Peterson Petroleum, Inc.". Handwritten thereon is "of New Hampshire". Bonnim Tanzman testified that a review of the Division's records disclosed that the ID number (141465316-9) used by PPNH is the diesel distributor's license number belonging to PP, Inc. The employer identification number (02-0425787) on Exhibits "X" and "Y" are the same. Exhibit "Z", a New York State Petroleum Business Tax Return filed by PP, Inc. for May 1993, contains the same ID number as the one used by PPNH on the return filed for April 1993 (see, Exhibit "Y").

Exhibit "K" containing the Al Ruth memo (see, footnote to Finding of Fact "2") states that PPNH had been operating as a 12-A distributor within New York State since May 1, 1992.

Exhibit "10", petroleum business tax and diesel motor fuel tax returns for various months in 1992, 1993 and 1994, indicates that PPNH sold diesel motor fuel in New York during these periods.

PPNH's president, Alicia Metz, testified (see, tr., p. 92) that PPNH operates and distributes fuel in New Hampshire and in New York. Lauren H. Simons, vice-president of PPNH, admitted (see, tr., p. 140) that PPNH distributed diesel fuel in New York without being registered to do so.

Exhibit "AA" consists of photocopies of checks from PPNH to New York State Sales Tax for the months of March and April of 1993 which evidence that PPNH was doing business in the State during these periods. Exhibit "BB", a handwritten sheet prepared by the auditor in the course of his interview with Lauren H. Simons on May 13, 1993, states that the taxpayer (PPNH) makes sales of heating oil to local customers and that product is picked up from Sun Oil in Rensselaer and distributed in Albany, Rensselaer, Columbia, Greene and Dutchess Counties. Also as part of Exhibit "BB" is an invoice from Sun Oil billed to PPNH in May 1993 for Fuel 2 which Mr. Tanzman testified (see, tr., p. 66) is No. 2 fuel oil.

(h) Reason No. 9 - The Sun Oil invoice (see, Exhibit "BB") indicates that the product purchased from Sun Oil and billed to PPNH was shipped to PP, Inc. At that time, PP, Inc. was a registered distributor; PPNH was not.

(i) Reason No. 10 - Schedule K of H & K's 1992 Federal return (see, Exhibit "DD") states that H & K was engaged in sales of petroleum products, yet it was not registered to do so in New York.

(j) Reason No. 11 - Mr. Tanzman testified that, for the years 1989 through 1992, H & K had been selling fuel oil. A review of the Division's records revealed, however, that no diesel motor fuel or petroleum business tax returns had been filed by H & K during these years.

(k) Reason No. 12 - It is conceded that H & K owns 100% of the stock of PPNH. As

of July 1, 1991, PP, Inc. became a wholly-owned subsidiary of H & K (see, Exhibit "EE"). On November 26, 1993, the Division cancelled the registration of PP, Inc. as a diesel motor fuel distributor (see, Exhibit "CC"). As of November 26, 1993, PP, Inc. was still owned by H & K.

(l) Reason No. 13 - Exhibit "DD", the New York State franchise tax return of H & K, indicates (on the Federal income tax return attached thereto) that Alicia Metz and Lauren Metz (a/k/a Simons) were each owners of 16.67% of H & K's stock.

(m) Reason No. 14 - As set out in Exhibit "D", this ground should be amended (see, tr., p. 72) to read that Peterson Petroleum, Inc. (not Peterson Petroleum of New Hampshire, Inc.) failed to file returns required of a distributor of diesel motor fuel. It is unclear from the record as to the periods for which returns were not filed by PP, Inc. (a return was filed for May 1993; see, Exhibit "Z").

(n) Reason No. 15 - See Reasons No. "12" and "13", supra.

Exhibit "GG", consisting of certain sales tax returns filed by PP, Inc. between June 1, 1993 and February 28, 1994, contains, on some of these returns, somewhat illegible signatures which bear a degree of similarity to the signature of James T. Metz found on a contract of sale wherein James T. Metz and Kathleen Metz sold to H & K their 40 shares in H & K for \$500,000.00 (see, Exhibit "HH") on or about December 24, 1990.

Bonnim Tanzman testified that a review of H & K's 1992 franchise tax return (Exhibit "DD"), when compared with the 1990 personal income tax returns of James T. and Kathleen Metz, reveals a common ownership in corporations and assets. From this, Mr. Tanzman concluded that James T. Metz was still involved in the operations of H & K and PPNH during periods subsequent to his alleged disassociation therefrom. The 1992 franchise tax return of H & K sets forth the names of each of its officers; the names of James T. Metz, Jr. and Kathleen Metz do not appear thereon.

Alicia Metz, daughter of James T. and Kathleen Metz, became associated with PPNH in early 1991 and became its president in May 1993. Since 1988 or 1989, she was also associated with H & K. Ms. Metz is involved with the financing, capital improvement and banking

portions of PPNH's business.

Shortly after H & K purchased PPNH (in late 1990 or early 1991), Sun Oil became engaged in corporate restructuring. Because their distributors were graded and monitored by their quantity of sales, Sun Oil requested that the gallonage of the New Hampshire location and the New York location be combined, i.e., they wanted the accounts of PP, Inc. and PPNH to be operated as one account.

H & K, which owns both PP, Inc. and PPNH, is owned by Alicia Metz and her five brothers and sisters. As indicated in Finding of Fact "9", her parents each owned 20% of H & K until December 1990. Pursuant to the agreement by which her parents sold their shares of stock in H & K, they were each to receive the sum of \$250,000.00 for the shares. Alicia Metz testified that, to her knowledge, there is no outstanding obligation to her parents for H & K's purchase of their shares, although no proof of payment or other evidence of the satisfaction of this obligation was presented.

The officers of H & K are Alicia Metz, president; Lauren Simons, vice-president; and Kathryn Metz, secretary-treasurer.

Alicia Metz stated that her father, James T. Metz, Jr., was, at one time, the president of PPNH but that he resigned his position on April 10, 1993 (see, Exhibit "2"). Since that time, he has not served as an officer, director or salaried employee of PPNH, although he has, from time to time, provided consultation to Ms. Metz and to Ms. Simons and her husband.

The affidavit of James T. Metz, Jr. (Exhibit "3") corroborates Ms. Metz's testimony regarding his association with H & K and PPNH and, in addition, states, in pertinent part, as follows:

"6. In 1991, H & K purchased PPNH, a distributor of gasoline and diesel fuel in New Hampshire. PPNH is the former Hartnett Oil Company, an entity that I and my wife purchased on October 1, 1988. Given my prior experience in operating Peterson Petroleum, Inc., I was elected president of PPNH. During the entire time that I had a role in operating PPNH and Peterson Petroleum, Inc., all sales and excise taxes were paid in full without exception.

"7. On October 19, 1992, PPNH submitted its application for registration as a distributor of diesel motor fuel. On that application, I was listed as president, my son-in-law John Simons III was named as vice-president, and my daughter Lauren

was listed as secretary.

"8. In a Notice of Proposed Refusal to Register, dated April 7, 1993, I was advised that the application would be denied because a responsible party on the application had outstanding tax liabilities. I was subsequently advised by the Tax Division that I was the responsible party with outstanding tax liabilities and that new application by PPNH would be favorably acted upon if I no longer had an interest in PPNH.

"9. At a meeting of the directors of PPNH in May, 1993, my wife's and my resignation as directors and officers of PPNH was acknowledged and my daughter Alicia was elected president. My son-in-law John Simons III and my daughter Lauren continued to hold the offices of vice-president and secretary, respectively.

* * *

"13. Since my resignation, I have not exercised any degree of control, whether direct or indirect, over PPNH, Peterson Petroleum, Inc., or H & K. Indeed, as noted above, in December 1990, my wife and I had sold our interest in H & K, the parent of PPNH."

Alicia Metz testified (see, tr., pp. 104, 105) that she did not realize that separate registration numbers were needed for PPNH and PP, Inc. and that the accountants for the corporations said that it was proper to use one registration number. When she learned that it was not proper, an application for registration as a diesel motor fuel distributor was made on behalf of PPNH.

As to the outstanding assessments against PPNH (see, Exhibit "5"), Ms. Metz testified that a Division employee visited the business approximately two to four weeks prior to the hearing in regard to a sales tax assessment (Assessment ID #L009117467 for the quarter ended August 31, 1993). Ms. Metz stated that this employee reviewed the books and records of PPNH and informed Lauren Simons that everything was in order and that no tax was due. Ms. Metz stated that, until reviewing the CARTS printouts (Exhibit "5") at the hearing, she had never received written notification from the Division concerning these assessments.

As to the outstanding assessments against H & K (see, Exhibit "5"), a balance of \$5,250.00 was due on Assessment ID #L004817499, an assessment for real property transfer gains tax. Ms. Metz testified that the attorney who handled the transaction for H & K was disbarred for having stolen \$200,000.00 to \$300,000.00. A portion was subsequently returned in June 1993 by the Lawyers' Fund for Client Protection of the State of New York (see, Exhibit

"4"). Ms. Metz stated that the attorney's theft resulted in the gains tax not having been timely remitted. Tax and interest were subsequently paid. Only penalty remained unpaid because H & K was under the impression that, because of the extenuating circumstances, it would be waived (see, Exhibit "5"). The Division did not waive the penalties asserted to be due.

The other outstanding assessment against H & K (Assessment ID #L001876940) resulted, according to the testimony of Alicia Metz, from the Division's aggregation, for gains tax purposes, of two parcels of land. A petition contesting a Conciliation Order (see, Exhibit "6") was filed with the Division of Tax Appeals (DTA No. 810879) but was, on January 14, 1994, withdrawn by the attorney for H & K (see, Exhibit "II").

Alicia Metz testified that H & K's principal business is the operation and management of income-producing real estate. She stated that H & K sells some heating oil on a very limited basis. On an application for an extension for filing a franchise tax return filed in March 1992 (see, Exhibit "7"), the principal business activity of H & K was listed as "fuel oil sales". Ms. Metz testified that after H & K purchased co-ops in Long Island in 1991, the principal business activity changed to operation and management of real estate.

Alicia Metz stated that PPNH started doing business in New York State in 1990 or 1991 (at that time she was a director). Originally, PPNH sold gasoline to service stations. In 1992 or 1993, PPNH began selling diesel motor fuel.

Ms. Metz testified that PP, Inc. continued to file diesel returns after PPNH was doing most of the business because PP, Inc. was already registered as a diesel motor fuel distributor, while PPNH was applying for registration.

Lauren H. Simons became involved with PPNH in 1992 and, in early 1993, became its vice-president. Her primary function with PPNH is in the dispatching of gasoline and in contacts with Sun Oil representatives involving both gasoline and diesel fuels. Ms. Simons is also a shareholder in and is the vice-president of H & K.

In June 1992, at the request of Sun Oil, the two distributorships (PP, Inc. in New York and PPNH in New Hampshire) were combined so that the gallonage would remain above the

minimum amount required to remain a Sunoco distributor.

Exhibit "BB" (see, Finding of Fact "8[g] and [h]"), the Sunoco invoice, was a purchase of gasoline by PPNH and of diesel fuel by PP, Inc. Ms. Simons stated that she thought it was proper to do it in this manner because H & K owned both corporations. In an attempt not to use PP, Inc.'s license improperly or to defraud the State, she requested that Sun Oil list the name of both corporations on the invoice.

As to the sales tax assessment against PPNH (see, Finding of Fact "14"), Ms. Simons testified that a Ms. Gerard, a Division employee, spoke with her sister, Kathryn T. Metz. After looking at PPNH's books and records (including checks and returns) and meeting with the bookkeeper, Kathryn was told that no additional tax was owed by PPNH.

Subsequent to the hearing, petitioner's representative (James H. Tully, Jr.) submitted an affidavit, sworn to on September 26, 1994, which stated, in pertinent part, as follows:

"2. After the Tax Division presented indication of assessments against Peterson Petroleum of New Hampshire, Inc. for the periods including August, 1993 and September, 1993, I discussed the matter with my client. They said that a Compliance Agent had come down, had examined the matter and determined that the indications were that Peterson Petroleum of New Hampshire, Inc. did not owe the taxes involved and filed a protest for Peterson Petroleum of New Hampshire with the Protest Unit. I asked them who was the Compliance Agent involved and they said it was one Dawn Gerard. They gave me her card which indicated that she was from the Capital Region Office in Schenectady.

"3. I called Ms. Gerard last week but she was out of the office most days and she wasn't able to return my call until this morning. She confirmed what I had been told by Ms. Metz and Mrs. Simons, the two officers of Peterson Petroleum of New Hampshire, Inc. who appeared at the hearing. She said she filed the matter with the Protest Unit; that she picked up copies of the amended returns that were filed in June; Ms. Gerard indicated she did not understand why the amended returns hadn't appeared on the printout but that at the present time there are no outstanding assessments against Peterson Petroleum of New Hampshire, Inc. and that if there was any problem with the matter, Peterson Petroleum of New Hampshire, Inc. would hear directly from the Protest Unit."

An affidavit of Kathryn T. Metz (secretary of PPNH and H & K), sworn to September 22, 1994, was also submitted after the hearing. This affidavit stated, in pertinent part, as follows:

"3. In late July 1994, I was visited unannounced by Dawn Gerard, Tax Compliance Agent I, regarding two sales tax assessments against PPNH. PPNH never received copies of these assessments. I understand that both assessments,

L009117467-6 and L009023428-5, concern sales tax for the periods June 1 through August 30, 1993, and September 1 through November 30, 1993, respectively.

"4. Ms. Gerard advised me that the Tax Department was unable to reconcile PPNH's monthly sales tax returns for this period with its ST-100 Quarterly Sales and Use Tax Returns. See Exhibit A attached hereto. I advised Ms. Gerard that PPNH had mistakenly transferred wrong figures from internal spreadsheets to the quarterly returns. When the mistake was discovered in July, 1994, amended quarterly returns were submitted and minor underpayments were tendered. See Exhibit B attached hereto. This unintentional reporting error, which was corrected by PPNH on its own initiative, apparently triggered the visit by the Tax Division's Compliance Section.

"5. Apparently, Ms. Gerard was not aware that the amended quarterly returns had been filed. During her visit to PPNH, Ms. Gerard was provided access to all records of PPNH and consulted with our financial officer, Raymond Li-De Yang. Ms. Gerard's review of PPNH's records took about 2 hours. At the conclusion of her review, Ms. Gerard advised me that PPNH's records were in order and that the assessments would be cancelled. Ms. Gerard also expressed her complete satisfaction with PPNH's performance of its sales tax collection responsibilities.

* * *

"7. I have also been advised that there are two assessments, L004817499 and L001876940, pending against H & K. The first assessment results from the illegal acts of our prior attorney who absconded with escrowed tax funds. The taxes were later paid from the Lawyers' Fund for Client Protection and the remaining assessment is for penalties only which, under the circumstances, should be cancelled. At the time of hearing on the petition, it was my understanding that the second assessment was under protest. I have no idea why the protest was withdrawn. Even though the protest was apparently withdrawn, H & K has not received any documentation from the Tax Division demanding payment for this assessment. I have discussed this newly discovered issue with my sister, Alicia Metz, President of H & K, and can state that this assessment will be satisfied."

In response thereto, the Division submitted an affirmation by Donald C. DeWitt (one of the attorneys representing the Division in this matter) which stated, in part, as follows:

"4. The Department has investigated the status of these sales and use tax assessments and, at this time, the assessments are still open of record. However, they have been marked for 'informal protest', which means that they will be reviewed by members of the Tax Compliance staff and, if warranted, adjustments will be made. No such review has been undertaken at this time nor have they been cancelled of record."

Ms. Simons also testified concerning her involvement with New England Air Transport, Inc. ("NEAT"). She stated that, in 1988, she was running her own business in Hamilton, New York and shared an office with NEAT. She was asked by NEAT to be its secretary and to help with telephones and sign for documents. Her father, James T. Metz, Jr., was a part-owner of

NEAT. She was subsequently assessed, as a responsible officer of NEAT, for sales taxes owed by the corporation. However, the assessment was cancelled by a BCMS conferee on August 8, 1994 (see, Exhibit "8").

Lauren Simons admitted that PPNH distributed diesel motor fuel without being registered to do so. She stated that, initially, she did not realize that a separate license was needed to distribute diesel fuel. She explained how Sun Oil requested that the gallonage for both distributorships be combined (see, Finding of Fact "17"), but stated that there was never any intent to defraud the State or to deprive the State of its proper tax revenues. In furtherance of this contention, checks and sales tax returns for 1993 and 1994 (see, Exhibit "9") and petroleum business tax and diesel motor fuel returns for periods between May 1992 and June 1994 (see, Exhibit "10") were submitted.

Ms. Simons stated that, as of the date of the hearing, PPNH was no longer selling diesel fuel, but that it had sold diesel fuel within the State of New York between October 1992 and January 1994.

CONCLUSIONS OF LAW

A. Tax Law § 282-a(2) provides as follows:

"No person shall engage within this state in the enhancement of Diesel motor fuel, make a sale or use of Diesel motor fuel (other than a retail sale not in bulk . . .) import or cause the importation of Diesel motor fuel into the state . . . unless such person shall be registered by the department of taxation and finance as a distributor of Diesel motor fuel All of the provisions of section two hundred eighty-three of this article shall apply to applicants for registration and registrants with respect to Diesel motor fuel, and, in addition, distributors with respect to Diesel motor fuel shall be subject to all other provisions of this article relating to distributors of motor fuel, including but not limited to, the keeping of records, the fixing, determination and payment of tax and filing of returns."

Tax Law § 282(1)(b) provides, in pertinent part, as follows:

"With respect to Diesel motor fuel, 'distributor' means any person, firm, association or corporation (i) who or which imports or causes to be imported into the state, for use, distribution, storage or sale within the state, any Diesel motor fuel; (ii) who or which produces, refines, manufactures or compounds Diesel motor fuel within the state; (iii) who or which engages in the enhancement of Diesel motor fuel in this state; (iv) who or which makes a sale or use of Diesel motor fuel in this state other than: (A) a retail sale not in bulk or (B) the self-use of Diesel motor fuel which has been the subject of a retail sale to such person; (v) who or which is registered by the department of taxation and finance as a distributor of

kero-jet fuel pursuant to the provisions of subdivision two of section two hundred eighty-two-a of this article"

B. Subdivisions (2) and (4) of Tax Law § 283 enumerate certain acts which must be considered by the Division upon its review of an application for registration as a motor fuel distributor. The provisions of Tax Law § 283 also apply to an applicant for registration as a diesel motor fuel distributor (Tax Law § 282-a[2]).

C. The Division, in its notice of proposed refusal to register issued on November 26, 1993, set forth nine grounds and, in a letter dated August 29, 1994, asserted six additional bases for refusing to register PPNH as a diesel motor fuel distributor. After careful consideration of the evidence presented, the sufficiency of each shall be examined separately.

Reason No. 1 - Prior to the issuance of the notice of proposed refusal to register, PPNH did not provide all of the information requested by the Division. Admittedly, the required information was eventually provided, either by petitioner or by its subsequent representative. While it is true, as the Division points out, that Tax Law § 283(1) provides that the "application shall be in a form and contain such data as the department of taxation shall prescribe", it is not an enumerated basis for refusal to register and, inasmuch as this omission has been cured, it cannot be found to be a sufficient basis for refusal to register PPNH as a diesel motor fuel distributor.

Reasons No. 2, 3, and 4 - At the time of the second application (July 30, 1993), James T. Metz, Jr. and Kathleen M. Metz had sold their stock in H & K (as of December 1990) and James T. Metz, Jr. had resigned his position as president of PPNH. H & K owned 100% of the stock of PPNH. While, clearly, James T. Metz, Jr. and Kathleen M. Metz did, at one time, own more than 10% of the stock of PPNH, this was not the case on the date of the second application. Therefore, these grounds pertaining to outstanding liabilities of these individuals and of corporations owned by them cannot be found to be sufficient bases upon which to refuse to register PPNH as a diesel motor fuel distributor.

Reason No. 5, 6, and 7 - Tax Law § 283(2)(e) provides, in part, that if an officer, director or shareholder of the applicant is an officer of another corporation which had taxes finally

determined to be due and which had not been paid in full, registration may be refused to such applicant. Lauren H. Simons does not dispute the Division's assertion that she was an officer (secretary) of New England Air Transport, Inc. She contends that she was not, however, a responsible officer of that corporation, i.e., that she was not personally responsible for the collection and remittance of taxes on behalf of New England Air Transport, Inc. The cancellation, by a BCMS conferee, of an assessment against her for such taxes (see, Exhibit "8") supports her contention. The statute (Tax Law § 283[2][e]) does not state that a person must be an officer personally responsible for the other corporation's taxes, only that such person was an officer. Therefore, it must be found that these reasons are sufficient bases upon which to refuse to register PPNH as a diesel motor fuel distributor.

Reason No. 8 - The evidence that PPNH operated in New York as a diesel distributor without being registered to do so is overwhelming and uncontroverted. While, in fact, PPNH may have done so without intending to defraud or to deprive the State of its just tax revenues and while under the directive of its supplier (Sun Oil), it is, nevertheless, clear that PPNH distributed diesel motor fuel in New York despite having been cautioned not to do so by the Division in various pieces of correspondence (see, Findings of Fact "4" and "5"). Alicia Metz and Lauren H. Simons have admitted that PPNH acted as distributor of diesel motor fuel using PP, Inc.'s registration number. Tax Law § 283(1) provides, in pertinent part, as follows:

"No person, unless so registered, shall import or cause any motor fuel to be imported into the state, for use, distribution, storage or sale within the state or shall produce, refine, manufacture or compound motor fuel within the state. No distributor, unless so registered, shall make any sale, transfer, use or other disposition of motor fuel within the state, except a sale, transfer, use or other disposition, if any, as to which the state cannot impose such condition by reason of the United States constitution and of laws of the United States enacted pursuant thereto."

When read in conjunction with the provisions of subdivision (2) and (4) of Tax Law § 283, it is clear that the distribution and/or sale of diesel motor fuel by PPNH without being duly registered is a sufficient basis upon which to refuse to register it as a diesel motor fuel distributor.

Reason No. 9 - The Division contends that PPNH, pursuant to Tax Law § 283(4)(iv),

"impersonated any person represented to be a distributor under this article but not in fact registered under this section." PP, Inc.'s registration as a diesel motor fuel distributor was cancelled on November 26, 1993. Therefore, any distribution activities by PPNH after that date which involved the use of PP, Inc.'s registration number would constitute a violation of Tax Law § 283(4)(iv).

For the month of January 1994, PPNH filed a PT-100, New York State Petroleum Business Tax Return (see, Exhibit "10") on which the preprinted label for PP, Inc. was altered so as to read "Peterson Petroleum of New Hampshire". Unlike some of the other returns on which PP, Inc.'s diesel motor fuel registration number (141465316) was used, no number was filled in. However, the printed statement immediately above the place for the signature (Lauren Simons signed this return on February 20, 1994) states:

"I certify that this business is duly licensed or registered to deal in each of the products that are being reported and that this return, including any accompanying riders is to the best of my knowledge and belief true, correct and complete."

A form PT-102, Tax on Diesel Motor Fuel, was attached indicating New York source receipts of \$10,421.00. Based upon the foregoing, it must be found that PPNH impersonated a distributor which was not, in fact, registered. Accordingly, refusal to register based upon this ground was sufficient basis therefor.

Reasons No. 10, 11 and 14 - Alicia Metz testified (see, Finding of Fact "15") that H & K sells heating oil on a limited basis. On an application for an extension for filing a franchise tax return (filed in March 1992), H & K listed its principal business activity as "fuel oil sales". Tax Law § 282-a(2) provides for a limited registration for retailers of heating oil, but under this limited registration, the retailer is allowed to sell diesel motor fuel to the consumer for heating purposes only and for certain enumerated purposes.

Exhibit "7" (1991 General Business Corporation Franchise Tax Return, Form CT-3) and Exhibit "DD" (1992 General Business Corporation Franchise Tax Return, Form CT-3) both indicate that H & K was, for those years, engaged in the sale of petroleum products. Yet, there is no evidence that H & K was ever registered or ever filed petroleum business or motor fuel tax

returns. Since there is a presumption of taxability on all diesel motor fuel (see, Tax Law § 285-b) until the contrary is established, absent proof that the product sold by H & K was not taxable, it must be found that since H & K, the owner of 100% of PPNH, operated as a distributor of diesel motor fuel without being registered to do so and without filing required returns, this was a valid ground upon which to refuse to register PPNH (see, Tax Law § 283).

Reasons No. 12 and 15 - It is undisputed that H & K was the owner of 100% of the stock of both PPNH and PP, Inc. Alicia Metz and Lauren Simons were officers and 16.67% shareholders of H & K (and were officers of PPNH) at the time that the registration of PP, Inc. was cancelled (November 26, 1993). Therefore, pursuant to Tax Law § 283(2)(e), this was a valid basis upon which to refuse to register PPNH as a diesel motor fuel distributor.

Reason No. 13 - Since Alicia Metz and Lauren Simons are officers and shareholders (16.67%) of H & K, which owns 100% of the stock of PPNH, and since it has heretofore (see, Reason No. 8) been determined that PPNH operated as a diesel motor fuel distributor in New York without being registered to do so, pursuant to the provisions of subdivisions (1), (2) and (4) of Tax Law § 283, this is a valid basis upon which the Division may properly refuse to register PPNH as a diesel motor fuel distributor.

D. In its memorandum of law submitted September 30, 1994 and in its reply memorandum submitted October 17, 1994, petitioner contends (in addition to specific denials of the grounds set forth in the Division's notice of proposed refusal to register and in the amended grounds enumerated in the Division's letter of August 29, 1994) that, to deny petitioner's registration would result in a harsh and inequitable result and be inconsistent with legislative intent (citing Matter of Barrier Oil Corporation, Tax Appeals Tribunal, January 4, 1991). It should be noted, however, that in Barrier Oil the Tribunal stated that acting as a distributor of motor fuel or diesel motor fuel while unregistered is in itself a sufficient ground to refuse to register an applicant.

In the present matter, a review of all of the testimony and documentary evidence reveals that Reasons No. 5 through 15 (see, Conclusion of Law "C"; Findings of Fact "6" and "7")

provide more than adequate grounds upon which to refuse to register PPNH as a distributor of diesel motor fuel. Petitioner contends that there was never any attempt to evade taxes or to deprive the State of its just revenues. In support of this contention, petitioner points to the fact that it filed sales tax, petroleum business tax and diesel motor fuel tax returns while using PP, Inc.'s registration number which, if it had intended to evade taxes, it surely would not have done.

The fact that taxes were paid does not justify the failure of petitioner to comply with the registration requirements of Article 12-A of the Tax Law. Unlike Barrier Oil (supra), this petitioner cannot even plead ignorance of the law or confusion therewith. The record is clear that the Division, on more than one occasion, informed petitioner that it could not act as a diesel motor fuel distributor without first being registered. The requests of Sun Oil to combine the two accounts aside, there is no justification for the continued activities of PPNH in distributing diesel motor fuel absent a license. While the statute (Tax Law § 283) requires that there be one valid ground upon which to justify a refusal to register, in the present matter there are several.

E. The petition of Peterson Petroleum of New Hampshire, Inc. is denied and the Notice of Proposed Refusal to Register as a Distributor of Diesel Motor Fuel issued November 26, 1993 is sustained.

DATED: Troy, New York
December 12, 1994

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE